UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT MESERVE, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	
ALLIED CONSTRUCTION CO., et al.,	)	
	)	*Civil No. 89-0238 P*
Defendants and	)	
Third-Party Plaintiffs	)	
	)	
v.	)	
	)	
N.A. BURKITT, INC.,	)	
	)	
Third-Party	)	
Defendant	)	

RECOMMENDED DECISION ON THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the court is the motion of third-party defendant N.A. Burkitt, Inc. (``Burkitt") seeking summary judgment on the claims of the third-party plaintiffs Allied Construction Company, Inc. (``Allied Construction"), Allied Crane Rental Company, Inc. (``Allied Crane") and Harry Noseworthy (third-party plaintiffs sometimes hereinafter referred to collectively as ``Allied") for indemnity and damages arising from a construction accident involving a crane that Burkitt sold to Allied Crane. Burkitt argues that summary judgment should be granted on all counts of the third-party complaint for two reasons: (1) Allied's claims for indemnification of any money damages awarded to the plaintiffs are barred by the Maine Workers' Compensation Act (``WCA"), 39 M.R.S.A. '' 1-113; and (2) claims for damages to the crane itself are barred because Burkitt disclaimed all warranties, express or implied, including the warranties of merchantability and fitness for a particular purpose.

The court shall render summary judgment if there remains ``no genuine issue as to any material fact" and if ``the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The material facts, viewed in the light most favorable to the non-moving party, *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988), may be summarized as follows: Burkitt sells construction equipment. Affidavit of Otis Graham, Jr. & 3 (Exh. B to third-party defendant's Amended Statement of Material Facts). In late January, 1986 Allied Crane contacted Burkitt to discuss purchasing a new crane. Affidavit of Kenneth White && 9-10 (Exh. A to Third-Party Plaintiffs' Amended Statement of Material Facts). Allen Hugo, an employee of Burkitt, invited Kenneth White, an Allied Crane employee, to examine a 1981 Pettibone model 110TKP hydraulic truck crane in Mobile, Alabama. *Id.* & 11; Amended Affidavit of Allan Hugo & 5 (Exh. A to third-party defendant's Amended Statement of Material Facts). The crane which Mr. White examined was unassembled. Affidavit of Kenneth White & 11. On January 29, 1986 Mr. White signed, on behalf of Allied Crane, a purchase order for the crane that he and Mr. Hugo had inspected in Mobile. *Id.* at & 18 and Exh. B thereto. He did so based on oral assurances he received from Otis Graham, Jr., president of Burkitt, and other Burkitt representatives that the crane would be assembled and delivered in ``A-1 condition" and that Burkitt would ``be responsible for any problems arising out of [Allied Crane's] use of the crane." *Id.* at && 16-19.

On or about February 17, 1986 Pettibone shipped the crane to Burkitt which assembled it and delivered it to Allied Crane on or about March 5, 1986. *Id.* & 20. After its delivery the crane required several repairs and Burkitt sent its mechanics to fix it. *Id.* && 21-22. Allied Crane was never charged for these repairs. *Id.* & 23. In April, 1986 Allied Crane notified Burkitt that the main winch on the crane was not operating. *Id.* & 24. Burkitt removed the winch from the crane at the worksite, brought it to its shop for repairs and returned to reinstall it on April 11, 1986. *Id.* && 25-26; Deposition of

Robert L. Meserve at 111. Plaintiff Robert Meserve was one of two Burkitt employees who returned to reinstall the winch. Deposition of Robert L. Meserve at 111. In order for the Burkitt mechanics to work on the crane, it was moved from its position at the work site onto a paved area. *Id.* at 116. The crane was turned off and the Burkitt mechanics proceeded to install the winch onto the crane. *Id.* at 118-19; Deposition of Jay Nason at 42-43. During the repairs the boom of the crane began to swing and the crane tipped over throwing plaintiff Robert Meserve onto the bed of the Burkitt repair truck. Deposition of Jay Nason at 48, 65-67; Deposition of Robert L. Meserve at 134-35. Plaintiff Robert Meserve subsequently filed a workers' compensation claim against Burkitt which was approved by the Workers' Compensation Commission on April 8, 1988 in full resolution of that claim. Affidavit of Otis Graham, Jr. & 7 and Exh. A thereto. The crane suffered damage to its body as a result of the accident. Affidavit of Kenneth White & 29.

I. Allied's Claim for Indemnity

A. Tort

Allied claims that Burkitt should indemnify it for any damages it may owe the plaintiffs. It contends that Burkitt's duty to indemnify arises under Maine's strict liability statute, 14 M.R.S.A. ' 221.[1] It argues that Burkitt negligently assembled and maintained the crane and is strictly liable for any damages resulting from its sale of an inherently dangerous and defective crane (Counts I & V). Burkitt asserts that it is protected from Allied's claims by ' 4 of the WCA which, it argues, immunizes it from any indemnity claims arising out of injuries to plaintiff Robert Meserve, its employee, sustained in the course of his employment.

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[1] 14 M.R.S.A. ' 221 reads:

> One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the

Section 4 of the WCA provides in relevant part:

product from or entered into any contractual relation with the seller.

> An employer who has secured the payment of compensation in conformity with [the WCA] is exempt from civil actions, either at common law or under sections 141 to 148,[2] Title 14, sections 8101 to 8118,[3] and Title 18-A, section 2-804,[4] involving personal injuries sustained by an employee arising out of and in the course of his employment, or for death resulting from those injuries. This exemption from liability applies to all employees . . . of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries.

39 M.R.S.A. ' 4. The Law Court has consistently held that ' 4 confers upon assenting employers ``full immunity except as otherwise provided therein from any civil action because of an industrial injury." *Roberts v. American Chain & Cable Co.*, 259 A.2d 43, 49 (Me. 1969); *see also McKellar v. Clark Equip. Co.*, 472 A.2d 411, 414 (Me. 1984); *Diamond Int'l Corp. v. Sullivan & Merritt, Inc.*, 493 A.2d 1043, 1046 (Me. 1985); *Gagne v. Carl Bauer Schraubenfabrick, GmbH*, 595 F. Supp. 1081, 1085 (D. Me. 1984). The Law Court has been unwilling to carve out exceptions to this broad immunity on equitable grounds: ``[The court] decline[s] to admit through the back door notions of fault and liability deliberately excluded from consideration by the workers' compensation system." *Diamond Int'l Corp.*, 493 A.2d at 1046. In this regard the Law Court has stated that for it ``to shift part of the third-party tortfeasor's liability onto the assenting employer merely on the basis of the equitable doctrine [of contribution] . . . would tend to frustrate pro tanto the purposes of the act." *Roberts*, 259 A.2d at 49. The purpose of the WCA is to ``[provide] certainty of remedy to the

[2] Maine Employer's Liability Act.

[3] Maine Tort Claims Act.

[4] Maine's Wrongful Death Act.

injured employee and absolute but limited and determinate liability for the employer." *McKellar*, 472 A.2d at 414. Based on this policy the Law Court has held that the employer's immunity ``extends to all non-contractual rights of contribution and indemnity." *Id.* at 416 (citing *Roberts*, 259 A.2d at 51).

Allied argues that ' 4 does not provide immunity to a seller or supplier of equipment for injuries to its employees because the seller is acting in a capacity other than that of employer.[5] It asserts that 14 M.R.S.A. ' 221 establishes a cause of action which is wholly separate from the comprehensive scheme of the WCA. Allied's argument, however, ignores well established case law. In *Adams v. Buffalo Forge Co.*, 443 A.2d 932 (Me. 1982), the Law Court explicitly stated that ``the doctrine [of strict liability] is not an expansion of consensual warranty liability but sounds in tort." *Id.* at 941. As an action in tort, any right of indemnity stemming from it is non-contractual. Thus, an action for strict liability is within the scope of immunity recognized in *Roberts* and *McKellar*. I conclude, therefore, that Burkitt is immune from Allied's claims, based on strict liability, for indemnification of damages

[5] Allied urges this court to adopt the ``dual capacity" theory of recovery as the governing law. Although the Law Court has not specifically addressed the dual capacity theory in any of its workers' compensation opinions, it has explicitly and unambiguously rejected any form of equitable contribution. *See Diamond Int'l Corp.*, 493 A.2d at 1047; *Roberts*, 259 A.2d at 49-50. Accordingly, I conclude that the Law Court has already addressed the principles underlying the doctrine of ``dual capacity" and has rejected them.

arising from the plaintiffs[6] injuries and that there is no genuine issue of material fact for trial on this issue. Fed. R. Civ. P. Rule 56(c).

B. Contract

Allied argues that an implied indemnification agreement arises from Burkitt's contract to supply a crane in merchantable condition and from its express and implied warranties of merchantability and fitness for a particular purpose. It contends that this implied agreement overrides the ' 4 immunity granted Burkitt and obligates Burkitt to indemnify it for any claims arising out of the purchase and use of the crane. Burkitt concedes that the Law Court has avoided ruling on the availability of implied contractual indemnification in workers' compensation cases, but argues that the Maine court has articulated strict requirements for granting exceptions to the general rule of immunity. It asserts that the doctrine of implied contractual indemnity is a minority rule and that the Law Court would follow the majority and conclude that the doctrine is inconsistent with the comprehensive workers' compensation system.

[6] Plaintiff Constance Meserve claims loss of consortium arising from the injuries her husband suffered as a result of the crane accident. *See* Complaint && 22-25, 49-52. Claims against an employer for loss of consortium are barred by ' 4 of the WCA to the same extent that the associated spousal personal injury claim is itself barred. *See McKellar*, 472 A.2d at 415.

While the Law Court has specifically recognized the availability of contractual rights of indemnity, *see Roberts*, 259 A.2d at 51, it has not been inclined to grant broad contractual exceptions to employer immunity. On the contrary, in *Diamond Int'l Corp.*, 493 A.2d at 1048, the Law Court held that a generally worded indemnification clause is insufficient to override the statutory immunity provided by the WCA. A contract purporting to waive the employer's immunity by indemnification agreement must contain a clear and specific waiver of the immunity provided in the WCA. *Id.*[7] The issue of implied contractual indemnification has yet to be directly addressed by the Law Court. In *Roberts*, 259 A.2d at 51, the court stated that ``[s]ome special contractual relationship between the employer and the third party may support an implied contractual obligation to indemnify such as may arise from an implied duty to use due care in a performance contract between them." *Id.* (citing 2 *Larson, The Law of Workmen's Compensation* ' 76.43 [1969]). However, the court was careful to express no opinion as to what type of special contractual relationship might create such an implied obligation. *Id.*

Allied argues that the contract between it and Burkitt, as well as express warranties and the continuing service calls, created a special relationship which gave rise to an implied contract of indemnity or, alternatively, that the issue of implied contractual indemnity raises a question of fact for trial. Allied urges this court to adopt the rationale of several cases from different jurisdictions in support of its argument that an implied contractual indemnity arose between it and Burkitt. These cases, however, fail to support Allied's claim.

[7] *See Gatley v. United Parcel Serv., Inc.*, 662 F. Supp. 200 (D. Me. 1987) (finding an explicit waiver of the employer's immunity valid).

In *Maccarone v. Hawley*, 507 A.2d 506 (Conn. App. 1986), the court determined that the third-party plaintiff's right of indemnity overrode the employer's workers' compensation immunity because the employer breached an express contractual provision to keep and maintain a dog and prevent it from harming others. *Id.* at 508.[8] The court in *Weggen v. Elwell-Parker Elec. Co.*, 510 F. Supp. 252 (S.D. Iowa 1981), held that a purchaser of a truck who made specific design and fabrication requests may have a duty to indemnify the manufacturer of the truck for damages recovered from the manufacturer by the purchaser's employee. *Id.* at 254. It determined that a special relationship arose between the purchaser and the manufacturer because the purchaser's ``input into the specifications and design modifications may be so intrusive, specialized and specific that it gives rise to an independent duty requiring the purchaser to use due care in the design and specification of component parts." *Id.* In *Port Auth. of New York & New Jersey v. Honeywell Protective Serv.,* 535 A.2d 974 (N.J. Super. A.D. 1987), the court held that a contract between a landlord and the contractor/employer created a special relationship from which implied indemnification might arise. *Id.* at 750.[9] It also found that a right of indemnification arises from a breach of an express contract provision requiring the employer to ```exercise every precaution to prevent injury to [such] persons.'" *Id.* at 751. The court, however, limited its holding to those contracts in which ``the contractor's

[8] In addition, the court found that no implied right of indemnity arose from a statute which imposes strict liability on the owner or keeper of a dog for injuries caused by that dog. *Id.*

[9] It appears, however, that this implied indemnification right does not arise out the contract itself, but rather from certain common law duties owed by the landlord to particular invitees. *See id.* As such it is a non-contractual right and would therefore be barred by ' 4 of the WCA.

responsibility to safeguard invitees from the peril of the dangerous condition it creates is express and manifest." *Id.* at 981.

Although Allied urges this court to accept as the law of Maine the reasoning of above cases, the posture of this case renders that course inappropriate. Allied has the burden of proving at trial that ``[s]ome special contractual relationship between [it and Burkitt] may support an implied contractual obligation to indemnify." *Roberts*, 259 A.2d at 51. The showing made by Burkitt in support of its motion for summary judgment is more than sufficient to shift to Allied the obligation ``to go beyond the pleadings and by [its] own affidavits, or by the `depositions, answers to interrogatories, and admissions on file' designate `specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed R. Civ. P. 56(c)). This Allied has failed to do. Even if this court were to accept Allied's contention that Maine would adopt the formulations of the special relationships summarized in the cases discussed above, it has failed to factually establish the presence of any of those elements here. The contract between Burkitt and Allied contains no express provisions that Burkitt will exercise every precaution to prevent injury, nor is a special relationship established such as that of landlord/contractor, designer/manufacturer or bailor/bailee.[10] *See also 2B A. Larson, The Law of Workmen's Compensation* ' ' 76.70-76.72, 76.81 (1989). I therefore conclude that Allied has failed to establish a special contractual relationship between itself and Burkitt.

[10] Allied argues that the express warranties created by the oral assurances of Burkitt also create an implied contractual obligation to indemnify. Because I find that the contract between Burkitt and Allied explicitly disclaims all warranties, express and implied, *see infra*, I need not reach this question. However, even if I were to conclude that express or implied warranties existed between these parties, I would feel compelled to decide that warranties alone would be insufficient to create the special contractual relationship referred to in *Roberts*, 259 A.2d at 51. As the Law Court intimated in *Roberts*, the special relationship must arise out of a contractual duty to use due care in a performance contract. *Id.* Warranties of merchantability and fitness for a particular purpose do not provide a duty on the part of the seller to use due care, but rather provide that the goods sold are of a merchantable quality, 11 M.R.S.A. ' 2-314, and are particularly suited to an intended use, 11 M.R.S.A ' 2-315.

Accordingly, I recommend that Burkitt's motion for summary judgment be granted as to all claims for indemnity for any damages which may arise from the plaintiffs' injuries.

II. Allied's Claims for Damages

A. Contract and Warranty Claims

Allied also seeks relief for damages it suffered as a result of the crane accident. It claims Burkitt breached both the contract to deliver a crane in merchantable condition as well as express and implied warranties of merchantability and fitness for a particular purpose. It asserts that oral representations made to it prior to the sale of the crane, and the subsequent service calls, created express and implied warranties of merchantability and fitness for a particular purpose. Burkitt contends that it disclaimed all warranties, express and implied. It argues that the written quotation form is the final written expression of all the terms and conditions of the sale and that any oral statements made prior to the sale are of no effect.

This transaction is controlled by the Maine Uniform Commercial Code (``UCC"), 11 M.R.S.A ' ' 1-101 - 10-108. Under Article 2 of the UCC ``[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." 11 M.R.S.A. ' 2-313(1)(a). In addition, each sale is subject to an implied warranty that the goods sold will be merchantable. 11 M.R.S.A. ' 2-314. The implied warranty of fitness for a particular purpose is created if ``the seller at the time of contracting has reason to know of any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." 11 M.R.S.A. ' 2-315. A seller, however, is free to exclude these warranties so long as those exclusions satisfy the requirements of 11 M.R.S.A. ' 2-316. Section 2-316 reads in relevant part:

> **(1)** Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> **(2)** Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

Id. Section 2-202 on parol or extrinsic evidence reads in relevant part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> **(1)** By course of dealing or usage of trade (section 1-205) or by course of performance (section 2-208).

11 M.R.S.A. ' 2-202.

Allied argues that Burkitt's oral representation that the crane would be delivered in ``A-1" condition was an ``affirmation of fact . . . which relates to the goods and [became] part of the basis of the bargain," 11 M.R.S.A ' 2-313, and thus constitutes an express warranty. Allied contends that the disclaimer on the quotation form is inoperative because it negates an express warranty. Allied's contention, however, runs directly afoul of the parol evidence rule. Section 2-316, upon which Allied relies, states specifically that it is subject to the provisions of the parol and extrinsic evidence rule, 11 M.R.S.A. ' 2-202. The written quotation form which confirmed this sale states that:

> Standard manufacturer's warranties, if any, apply. All other warranties, express or implied, including but not limited to the implied warranties of MERCHANTABILITY and fitness for a particular purpose, are excluded and shall not apply to the above described goods.

> This proposal . . . constitutes a final written expression of all the terms and conditions thereof and is a complete and exclusive statement of those terms. No other representations, statements, promises or warranties differing in any way from the terms of this proposal shall be of any force or effect.

Exh. A to Amended Affidavit of Allan Hugo. The form clearly recites that it is the final written expression of the parties, thus its provisions may not be contradicted by oral statements made prior to or contemporaneous with the final written agreement. 11 M.R.S.A. ' 2-202. In addition, the comment to ' 2-316 states that under this provision `[t]he seller is protected . . . against false allegations of oral warranties by its provisions on parol and extrinsic evidence." 11 M.R.S.A. ' 2-316[11] (comment 2). The terms of the order simply describes the crane to be sold and nothing more. Here, Allied is attempting to contradict those terms with a prior oral statement. I conclude that the order form contract between Burkitt and Allied is the final expression of their agreement and does not contain any express warranties.

Allied also argues that the disclaimer is inoperative as to the warranties of merchantability and fitness for a particular purpose because it is not conspicuous. The UCC defines ``conspicuous" as follows:

> **Conspicuous**. ``Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . . Language in the body of a form is

[11] Allied cites *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 320 (Me. 1982), for the proposition that a disclaimer of warranties is ineffective to the extent that it is inconsistent with any express warranty. Its reliance on this case is misplaced. In *Cuthbertson* the court addressed the alleged inconsistency between two written provisions of an agreement, not a conflict between an asserted oral representation and a written provision. *Id.*

> ``conspicuous" if it is in larger or other contrasting type or color. . . . Whether a term or clause is ``conspicuous" or not is for decision by the court.

11 M.R.S.A. ' 1-201(10). The Law Court has held to be conspicuous a term written in capital letters immediately above the signature of a party notifying the party of additional terms on the reverse side, also in capital letters, disclaiming all warranties. *Todd Equip. Leasing Co. v. Milligan*, 395 A.2d 818, 820-21 (Me. 1978). Here the disclaimer language is located on the front of an uncomplicated one-page document directly above the signature line. Although it appears in type somewhat smaller that the print used to describe the crane, these two items constitute virtually the only writing on the form. In addition, the term ``merchantability" is printed in capital letters in the second line of the first paragraph of the form material. I conclude that this provision is so written that a reasonable person against whom it is to operate ought to have noticed it and that this disclaimer effectively excludes the warranties of merchantability and fitness for a particular purpose. Accordingly, I conclude that there is no genuine issue as to any material fact on Allied's warranty and contract claims and that Burkitt's motion for summary judgment should be granted on this issue.

B. Strict Liability

Allied also argues that Burkitt is liable in tort for damages to Allied as a result of the failure of the crane. Burkitt contends that the damage to the crane itself is a purely economic injury. It asserts that the Maine courts do not recognize a cause of action in tort based on damages to a product itself and that Allied's remedies are limited to the contract remedies provided for in the UCC.

The Law Court has not addressed the question of whether a party can be liable in tort for injuries to a product resulting from that product's malfunction. Two Maine Superior Court decisions, however, have discussed this issue and both, adopting the Supreme Court's reasoning in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), have held that no cause of action lies in tort

where a party is claiming that a defective product damages only itself. *See Albin v. Chadwick-BaRoss, Inc.*, No. CV-87-88 (Me. Super. Ct., Cum. Cty., Aug. 3, 1988); *Hanington & Davis, Inc. v. Liebherr-America, Inc.*, No. CV-86-473 (Me. Super. Ct., Pen. Cty. Aug. 26, 1987), copies of which are attached as Exhs. D and C respectively to Third-party Defendant N.A. Burkitt, Inc.'s Memorandum of Law in Support of Motion for Summary Judgment. While this court is not bound by the decisions of a state's trial level courts on important questions of legal policy, it ``recognizes that in determining the existing content of state law in diversity cases, the decisions of the trial courts may serve as important guideposts." *Gagne*, 595 F. Supp. at 1087 n.7.

Although the Supreme Court's decision in *East River S.S. Corp.* is not determinative of Maine law on this issue, the Court's reasoning in that case is persuasive and it is probable that, like the Superior Court justices who have authored the above-cited decisions, the Law Court will adopt it. In *East River S.S. Corp.* the Supreme Court reasoned that:

> When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.
>
> The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the ``cost of an injury and the loss of time or health may be an overwhelming misfortune," and one the person is not prepared to meet. In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured.

Id. at 871 (citation omitted); *see also Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110, 117 (3rd Cir.), *cert. denied*, 484 U.S. 853 (1987). Allied argues that *East River S.S. Corp.* is not applicable to this case because it is claiming indemnity for damages arising from the plaintiffs' personal injuries. However, as discussed above the WCA bars all non-contractual claims for indemnity arising from workplace

injuries. Allied's remaining claims are based on injuries to its property and to the crane itself. *See* Third-Party Complaint && 29, 54. Allied, however, has failed to submit any evidence that it suffered any damage to its property other than damage to the crane itself. *Celotex*, 477 U.S. at 324; Fed. R. Civ. P. 56(c); *see* Affidavit of Kenneth White && 28-30. I conclude that the Law Court will not recognize actions in tort based on purely economic injuries arising from a product's failure and that Burkitt is therefore entitled to summary judgment on the tort claims for damage to the crane.

III. Conclusion

For the foregoing reasons I conclude that Allied has failed to establish any genuine issues for trial on their third-party complaint. Accordingly, I recommend that Burkitt's motion for summary judgment be ***GRANTED***.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 9th day of April, 1990.

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David M. Cohen
United States Magistrate